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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KLAMATH-SISKIYOU WILDLANDS
CENTER, *ET AL.*,

Plaintiffs,

v.

NOAA NMFS, *ET AL.*,

Defendants,

and

) Case No. 3:13-cv-3717-NC

)

)

) **PLAINTIFFS' MOTION FOR**
) **SUMMARY JUDGMENT**

)

)

) Hearing Date: November 14, 2014 at 1:00
) p.m. in Courtroom A, 15th Floor

)

)

1)
FRUIT GROWERS SUPPLY COMPANY,)
2)
Defendant-Intervenor.)
3)

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GLOSSARY OF ABBREVIATED and KEY TERMS

| Term | Description |
|----------------------|--|
| ACS | Aquatic species conservation strategy. Chapter 5 of the HCP sets forth the ACS. |
| BiOp | Biological opinion. A federal agency prepares a biological opinion pursuant to 16 U.S.C. § 1536. |
| clearcutting | A method of logging whereby nearly every tree in a given stand is logged. Sometimes referred to as “even-aged harvest” or “regeneration harvest.” |
| CSA | Conservation Support Areas |
| dispersal habitat | Forests used by northern spotted owls to travel from the owl’s home range to other areas. |
| EIS | Environmental impact statement |
| FEIS | Final environmental impact statement |
| FGS | Fruit Growers Supply Company |
| HCP | Habitat conservation plan. An HCP is an application for an incidental take permit. <i>See</i> 16 U.S.C. § 1539(a). |
| ITP | Incidental take permit. An ITP authorizes take of species protected by the Endangered Species Act. <i>See</i> 16 U.S.C. § 1539(a). |
| Salmonid | Refers to trout or salmon and includes coho and Chinook salmon as well as steelhead. |
| SONCC coho | Southern Oregon/Northern California Coast coho salmon |
| spotted owl circle | The area that represents a northern spotted owl’s home range. In the region of the HCP, it consists of a 1.3 mile radius circle with a 0.5 mile radius inner core. |
| suitable owl habitat | Refers to forested areas that are suitable for use by northern spotted owls for nesting, roosting, foraging. |
| TCS | Terrestrial species conservation strategy. Chapter 5 of the HCP sets forth the TCS. |

1 Plaintiffs Klamath-Siskiyou Wildlands Center, Center for Biological Diversity, and Klamath
2 Forest Alliance (collectively “KS Wild”) file this Motion for Summary Judgment challenging the U.S.
3 Fish and Wildlife Service’s (“FWS”) and the National Marine Fisheries Service’s (“NMFS”)
4 (collectively “the Services”) issuance of incidental take permits to the Fruit Growers Supply Company
5 (“FGS”). The permits authorize the incidental take of northern spotted owls and Southern
6 Oregon/Northern California Coast coho salmon that will occur because of logging activities covered by
7 the *Fruit Growers Supply Company Habitat Conservation Plan* (“the HCP”), which FGS developed
8 pursuant to Section 10(a) of the Endangered Species Act, 16 U.S.C. § 1539(a). This motion is scheduled
9 for oral argument on November 14, 2014 at 1:00 p.m.

10 KS Wild requests that this Court enter judgment against the Services and invalidate and vacate
11 the incidental take permits, associated biological opinions, and environmental impact statement.

12 I. INTRODUCTION

13 The U.S. Fish and Wildlife Service’s decision to issue the northern spotted owl permit is
14 arbitrary and capricious because it is based on a finding that vastly overstates the conservation
15 value FGS will provide to northern spotted owls. Before issuing an incidental take permit FWS
16 must find that “the applicant will, to the maximum extent practicable, minimize and mitigate the
17 impacts of such taking.” 16 U.S.C. § 1539(a)(2)(B)(ii). To help it make the “minimize and
18 mitigate” finding at issue here, FWS compared the “conservation value” of the spotted owl home
19 ranges FGS will help conserve to the “conservation value” of the spotted owl home ranges FGS
20 will log. To ascertain the conservation value of the spotted owl home ranges, FWS developed a
21 formula that assigned high conservation values to spotted owl home ranges containing a high
22 percentage of federal land. Using those conservation values, FWS concluded that the
23 conservation value created by preserving about 7,000 acres of owl habitat will “outweigh” the
24 conservation value that will be lost when FGS logs over 36,000 acres of owl habitat. Looking

1 closely at the data demonstrates the absurdity of FWS’ accounting method: the conservation
2 value FWS awarded Fruit Growers for preserving 66 acres of habitat in one home range exceeds
3 the conservation value that will be lost when FGS logs over 18,000 acres of owl habitat in 23
4 other home ranges—logging that will harm up to 40 northern spotted owls.

5 FWS’ “minimize and mitigate” finding is arbitrary and capricious because FWS gave Fruit
6 Growers credit for conservation value provided by other landowners, in violation of Section
7 10(a)(2)(B)(ii) of the ESA, 16 U.S.C. § 1539(a)(2)(B)(ii). That Section only allows FWS to make the
8 “minimize and mitigate” finding based on what “the applicant” will do. But by awarding FGS
9 conservation credit based on the conservation value of entire home ranges, instead of based on the actual
10 number of acres FGS will preserve in each home range, FWS awarded Fruit Growers credit for
11 preserving entire home ranges even though most of the land in those areas is owned by someone other
12 than FGS and even though those other landowners are not “applicants” for the permits. In doing so,
13 FWS “relied on factors which Congress has not intended it to consider”—actions by someone other than
14 “the applicant”—rendering issuance of the permit arbitrary and capricious. *Motor Vehicles Mfrs. Ass’n*
15 *of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

16 FWS compounded its error by concluding that FGS would mitigate some impacts by
17 “promoting” decreases in clearcutting and corresponding increases in dispersal habitat. But FGS made
18 no such commitments, FWS lacks any means to enforce those illusory promises, and the HCP lacks any
19 monitoring program to determine whether those changes occur. Reliance on that unenforceable
20 mitigation renders the permits and biological opinion invalid. *Sw. Ctr. for Biological Diversity v. Bartel*,
21 470 F. Supp. 2d 1118 (S.D. Cal. 2006); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d
22 917, 935-36 (9th Cir. 2008).

23 Both agencies then exacerbated those problems by under-estimating the impacts of the HCP in
24 their “no jeopardy” findings. Before issuing incidental take permits the Services must find that approval

of an HCP will not jeopardize the continued existence of any species or adversely modify or destroy any species' designated critical habitat. *See* 16 U.S.C. §§ 1536(a)(2), 1539(a)(2)(B)(iv). FWS' "no jeopardy" findings are arbitrary and capricious because FWS assumed that habitat conditions on nearby U.S. Forest Service lands would remain "static" throughout the permit term even though elsewhere in its biological opinion FWS documented region-wide spotted owl habitat declines on Forest Service lands due to fire, logging, insect infestation, and barred owls. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010) (reliance on contradictory conclusions renders a biological opinion arbitrary and capricious). Similarly, NMFS' "no jeopardy" findings are invalid because NMFS failed to analyze impacts to coho salmon on the three-year time-frame relevant to the species, as required by the Ninth Circuit. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005). Like FWS, NMFS also improperly relied on unenforceable mitigation measures such as road management measures that FGS need only implement where they deem it "feasible."

Finally, the Services' Environmental Impact Statement is unlawful because it failed to disclose and discuss FGS' financial targets even though those targets were the company's express justification for seeking the permits. The EIS also failed to consider the cumulative effects on northern spotted owls of timber harvest on adjacent lands; the effects of herbicide and other chemical applications on FGS lands; and the effects of water withdrawals on salmonids.

II. BACKGROUND

A. The Endangered Species Act.

The ESA provides a comprehensive statutory scheme with the "broad purpose" of protecting and recovering populations of endangered and threatened species and the ecosystems on which those species depend. 16 U.S.C. § 1531(b); *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687, 698 (1995). The language, history, and structure of the ESA "indicate beyond doubt" that Congress intended protected species to be afforded "the highest of

1 priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

2 The foundational provision of the ESA is the prohibition on actions that “take”
3 endangered species. *See* 16 U.S.C. § 1538(a)(1)(B). Regulations adopted by the Services also
4 apply the ESA’s take prohibition to threatened species such as the northern spotted owl and
5 Southern Oregon/Northern California Coast coho salmon (“SONCC coho”). 16 U.S.C. §
6 1532(20); 50 C.F.R. § 17.31(a); 50 C.F.R. § 222.301(b). The term “take” includes “significant
7 habitat modification or degradation where it actually kills or injures wildlife by significantly
8 impairing essential behavioral patterns, including breeding, feeding or sheltering.” 16 U.S.C. §
9 1532(19); 50 C.F.R. § 17.3; 50 C.F.R. § 222.102.

10 Section 10(a)(1)(B) of the ESA creates a limited exception to the ESA’s take prohibition
11 by authorizing the Services to permit the take of listed species that incidentally results from
12 otherwise lawful activities. 16 U.S.C. § 1539(a)(1)(B). In return for minimizing and mitigating
13 the impacts of the authorized take, the permit holder gains long-term regulatory certainty
14 including “permit shield” protections against civil and criminal liability under the ESA. *See*
15 *generally* 16 U.S.C. §§ 1538(a)(1), 1540. Even if circumstances change after issuance of an
16 incidental take permit, the Services’ “No Surprises” policy prohibits the Services from imposing
17 additional resource or management restrictions without the consent of the permit holder. 50
18 C.F.R. § 17.32(b)(5); 50 C.F.R. § 222.307(g).

19 Because the permit allows otherwise illegal harm to an imperiled species, Section 10 of
20 the ESA sets forth a rigorous and detailed permit application process that the applicant and the
21 Services must follow prior to permit issuance. *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1282
22 (S.D. Ala. 1998). To apply for a permit the applicant must develop an HCP that specifies: the
23 impact that will likely result from the permitted taking; the steps the applicant will take to
24 minimize and mitigate such impacts; the funding that will be available to implement such steps;

1 what alternative actions to such taking the applicant considered and the reasons why such
 2 alternatives are not being utilized; and such other measures that the Secretary may require. 16
 3 U.S.C. § 1539(a)(2)(A). Before issuing the permit the Services must find that: the permitted
 4 taking will be incidental; the applicant will, to the maximum extent practicable, minimize and
 5 mitigate the impacts of such taking; the applicant will ensure that adequate funding for the plan
 6 will be provided; the taking will not appreciably reduce the likelihood of the survival and
 7 recovery of the species in the wild; and that any additional measures required by the Service are
 8 provided. 16 U.S.C. § 1539(a)(2)(B). The Services' regulations largely reflect the statute. *See*
 9 50 C.F.R. § 17.32; 50 C.F.R. § 222.307.

10 There are two core and distinct components of the HCP application and approval process.
 11 First, the Services must find that "the applicant" will minimize and mitigate the impacts of the
 12 taking "to the maximum extent practicable." 16 U.S.C. § 1539(a)(2)(B)(ii). The Services
 13 recognize that HCPs may involve interests other than the applicant. But in order for the Services
 14 to consider conservation measures by others "...the applicant must have specific authority over
 15 the other parties affected by the HCP and be willing to exercise that authority, or must secure
 16 commitments from them that the terms of the HCP will be upheld." *See Habitat Conservation*
 17 *Planning And Incidental Take Permit Processing Handbook* (hereinafter "HCP Handbook") at 7-
 18 5 to 6.¹ This is a "strict" requirement. *Sierra Club v. Babbitt*, 15 F. Supp. 2d at 1282.

19 Second, for most HCPs the Services must prepare a biological opinion ("BiOp") and
 20 insure that a proposed permit is not likely to jeopardize a listed species or adversely modify or
 21 destroy any species' designated critical habitat. 16 U.S.C. § 1536(a)(2). A valid "no jeopardy"

23 ¹ Portions of the HCP Handbook are attached as Exhibit A to the *Declaration of Wyatt*
 24 *Golding* (concurrently filed). The HCP Handbook is available in full at
<http://www.fws.gov/endangered/esa-library/>. *See also* 61 Fed. Reg. 63854 (Dec. 2, 1996); 65
 Fed. Reg. 35242 (June 1, 2000).

1 finding in a biological opinion can also satisfy the ESA Section 10(a)(2)(B)(iv) finding. *Nat'l*
 2 *Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1285 (E.D. Cal. 2000). While both the
 3 minimize and mitigate finding and no jeopardy findings consider environmental impacts, they
 4 are distinct in that the former focuses on conservation measures the applicant will carry out and
 5 the latter gives broader consideration to environmental impacts as they are likely to occur in a
 6 given context. *See Nat'l Wildlife Fed'n v. Norton*, Civ. No. S-04-0579 DFL JF, 2005 WL
 7 2175874 at *7-*19 (E.D. Cal. 2005).

8 A BiOp must meet certain requirements to “insure” a lack of jeopardy. First, the agency
 9 preparing the BiOp must analyze impacts to species on a temporal and spatial scale matching the
 10 life-cycle of the species. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries*
 11 *Serv.*, 265 F.3d 1028, 1037 (9th Cir. 2001); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S.*
 12 *Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005); *Nat'l Wildlife Fed'n v. NMFS*, 524
 13 F.3d 917, 934-35 (9th Cir. 2008). Second, the Services may only rely on mitigation measures
 14 that are reasonably certain to occur. *Id.* at 934-35. Reliance on uncertain, unenforceable, or
 15 voluntary mitigation renders a BiOp arbitrary and capricious. *Ctr. for Biological Diversity v.*
 16 *Bureau of Land Mgt*, 698 F.3d 1101, 1117 (9th Cir. 2012); *Sierra Club v. Marsh*, 816 F.2d 1376,
 17 1386 (9th Cir. 1987). Third, the Service must use the “best scientific and commercial data
 18 available.” 16 U.S.C. § 1536(a)(2).

19 A uniting theme across the ESA is that the agency must give the benefit of the doubt to
 20 the species because, under the ESA, risk “must be borne by the project, not by the endangered
 21 species.” *Sierra Club v. Marsh*, 816 F.2d at 1386; *Ariz. Cattle Growers' Ass'n v. Salazar*, 606
 22 F.3d 1160, 1166-67 (9th Cir. 2010) (referring to the ESA as maintaining a “policy of
 23 institutionalized caution”). Accordingly, the Services may only rely on enforceable, reasonably
 24 certain mitigation of environmental harms when making decisions regarding listed species. *See*

1 *Nat'l Wildlife Fed. v. NMFS*, 524 F.3d at 935-936 (ESA Section 7); *Sw. Ctr. for Biological*
 2 *Diversity*, 470 F. Supp. at 1146 (ESA Section 10); *Greater Yellowstone Coal., Inc. v. Servheen*,
 3 665 F.3d 1015, 1029 (9th Cir. 2011) (ESA Section 4, regarding the decision to list or delist a
 4 species).

5 B. The National Environmental Policy Act.

6 In enacting the National Environmental Policy Act (NEPA) in 1969, Congress directed
 7 all federal agencies to assess the environmental impact of proposed actions that significantly
 8 affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA is our Nation's basic
 9 charter for the protection of the environment and was enacted to "help public officials make
 10 decisions that are based on [an] understanding of environmental consequences, and to take
 11 actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). NEPA's
 12 disclosure goals are two-fold: (1) to insure that the agency has fully contemplated the
 13 environmental effects of its action; and (2) to insure that the public has sufficient information to
 14 challenge the agency's action. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*,
 15 462 U.S. 87, 97 (1983).

16 The Council on Environmental Quality promulgated uniform regulations to implement
 17 NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 *et seq.*
 18 NEPA requires the preparation of an EIS for all "major federal actions significantly affecting the
 19 quality of the human environment." 42 U.S.C. § 4332(2)(C). "Major federal actions" include
 20 issuance of an incidental take permit. 40 C.F.R. § 1508.18(b)(4).

21 An EIS is a "detailed written statement" that "provide[s] full and fair discussion of
 22 significant environmental impacts and shall inform decision makers and the public of the
 23 reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality
 24 of the human environment." 40 C.F.R. §§ 1508.11, 1502.1. An EIS must describe: (1) the

1 environmental impact of the proposed action; (2) any adverse environmental effects that cannot
2 be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the
3 relationship between short-term uses of the environment and the maintenance and enhancement
4 of long-term productivity; and (5) any irreversible or irretrievable commitment of resources that
5 would be involved in the proposed action. 42 U.S.C. § 4332.

6 NEPA's overarching requirement for an EIS is that the federal government take a "hard
7 look" at the impacts of the action and "ensure that environmental information is available to
8 public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. §
9 1500.1(b). Accurate scientific analysis, expert agency comments, and public scrutiny are
10 essential to implementing NEPA. *Id.* An EIS must therefore consider both direct and indirect
11 environmental impacts of a proposed action. *See* 40 C.F.R. §§ 1508.8(a) & (b).

12 NEPA also requires the Services to assess the cumulative environmental effects of
13 proposed agency actions. 40 C.F.R. § 1508.7. Cumulative effects are the impact of the proposed
14 action when added to other past, present, and reasonably foreseeable future actions. *Id.*
15 Cumulative impacts result from individually minor but collectively significant actions taking
16 place over a period of time. *Id.* The "EIS must analyze the combined effects of the actions in
17 sufficient detail to be 'useful to the decisionmaker in deciding whether, or how, to alter the
18 program to lessen cumulative impacts.'" *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177
19 F.3d 800, 810 (9th Cir. 1999) (citation omitted). "General statements about 'possible effects'
20 and 'some risk' do not constitute a 'hard look' absent a justification regarding why more
21 definitive information could not be provided." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S.*
22 *Dept. of the Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (citation omitted).

23 C. Fruit Growers' Land and Logging Activities.

24 The incidental take permits challenged here apply to approximately 152,178 acres of

1 forest land owned by FGS in northern California. AR 35942.² FGS lands are in a
 2 “checkerboard” pattern: many of its lands are adjacent to the Klamath National Forest, which is
 3 managed by the U.S. Forest Service, or to lands managed by the Bureau of Land Management.
 4 AR 36000; AR 36002 (map showing ownership). FGS lands feature a rugged and diverse
 5 landscape ranging from low river valleys to 7,000 foot mountain peaks. AR 36012. As a result,
 6 FGS lands feature unusually rich biological diversity and support northern spotted owls, SONCC
 7 coho salmon, and myriad other species dependent on older forest habitats.

8 FGS harvests timber and conducts related operations, such as road building and
 9 maintenance, on the lands covered by the incidental take permits (hereinafter “FGS lands”). AR
 10 35957. Fruit Growers manages its land in northern California in three management units: the
 11 Klamath River Management Unit in the Klamath River watershed; the Grass Lake Management
 12 Unit in the Shasta River watershed; and the Scott Valley Management Unit in the Scott River
 13 watershed. AR 35945. To facilitate logging FGS has built and maintained an extensive road
 14 network throughout its lands. AR 36021. FGS manages approximately 1,100 miles of roads,
 15 and shares an additional 250 miles of roads with other managers, for a total road density of
 16 approximately 4 to 7 miles of road per square mile of FGS forest. AR 38447; AR 36021.

17 D. Logging Can Harm Northern Spotted Owls.

18 Northern spotted owls are medium-sized, dark brown owls with white spots and dark
 19 eyes. *Designation of Revised Critical Habitat for the Northern Spotted Owl*, 77 Fed. Reg.
 20 71876, 71883 (Dec. 4, 2012). They are endemic to the Pacific Northwest and can live up to 20
 21 years in the wild. AR 35983. Northern spotted owls generally nest, roost, and forage in blocks
 22

23 ² KS Wild references the FWS record as AR followed by the bates number and references
 24 the NMFS record as NMFS AR followed by the bates number. The Court may access the
 documents by looking to the master index for each record and matching the bates number range
 in the column labeled “bates number” with the associated document in the record.

1 of mature and older forests containing large old trees. AR 35987.

2 Throughout the range of the northern spotted owl logging has severely reduced the
3 species' habitat and caused significant population declines. In 1990, the FWS listed northern
4 spotted owls as "threatened" under the ESA. *See Determination of Threatened Status for the*
5 *Northern Spotted Owl*, 55 Fed. Reg. 26114 (June 26, 1990) (codified at 50 C.F.R. § 17.11(h)). In
6 its final listing rule, the FWS noted that the northern spotted owl is threatened throughout its
7 range "by the loss and adverse modification of suitable habitat as the result of timber
8 harvesting." *Id.* Historical timber harvest and land-conversion were the primary causes of an
9 estimated 60 to 88 percent decline in northern spotted owl habitat from the 1800s to 1990. AR
10 35986. Logging can adversely impact northern spotted owls by removing habitat, creating noise
11 disturbance, increasing forest fragmentation, and altering landscape characteristics to create
12 habitat conditions that support barred owls, a competitor species. AR 34224-25.

13 Northern spotted owls are particularly susceptible to harm from logging because they are
14 territorial—they live in specific forests and return to nest in the same forest stands over time—
15 and are usually monogamous. AR 35984. Each nesting pair has a "home range," which consists
16 of areas used for nesting, roosting, and foraging. AR 35984. Home ranges vary in size and
17 shape depending on region and topography, but are generally characterized as a circle drawn
18 around a recognized northern spotted owl activity center. AR 35984. For purposes of the HCP,
19 the home range (referred to herein as an "owl circle") covers approximately 3,398 acres, which is
20 equivalent to the area of a circle with a radius of 1.3 miles. AR 35985. The "core area" of the
21 home range covers 500 acres, which is equivalent to the area of a circle with a 0.5 mile radius,
22 and is the most important area for nesting and roosting. AR 35985.

23 FWS determines whether "take" of northern spotted owls is likely to occur by evaluating
24 whether logging will reduce the amount of nesting, roosting, and foraging habitat within an owl

1 circle below certain minimum thresholds. AR 36192. Nesting habitat predominantly consists of
2 large, old trees with various deformities such as cavities, broken tops, and mistletoe platforms
3 that provide nesting opportunities. Roosting habitat provides thermoregulation, shelter, and
4 cover to reduce predation risk while resting or foraging. Foraging habitat consists of areas where
5 spotted owls hunt and may feature fragmented or younger forests. *See* 77 Fed. Reg. at 71884-85.

6 Logging can also make spotted owl dispersal more dangerous. For juveniles or displaced
7 adults to safely leave the home range spotted owls require dispersal habitat. *Id.* To provide the
8 required biological function, dispersal habitat must be connected to blocks of nesting and
9 roosting habitat and must consist of forest “stands with adequate tree size and canopy cover to
10 provide protection from avian predators and at least minimal foraging opportunities.” *Id.*

11 Logging can eliminate dispersal habitat and remove corridors between habitat blocks. AR
12 34224-25. Spotted owls that have to travel over large expanses of unsuitable habitat are at a
13 significant risk of predation and starvation. 77 Fed. Reg. at 71884.

14 E. Logging Can Harm Southern Oregon/Northern California Coast Coho Salmon.

15 SONCC coho are anadromous fish. AR 35966. When adult SONCC coho reach sexual
16 maturity, at around 3 years old, they migrate from saltwater into freshwater streams to spawn
17 before dying. AR 35966. SONCC coho require relatively pristine freshwater to successfully
18 spawn and rear. AR 35969. Freshwater habitat must feature abundant, cool, well-oxygenated
19 water that flows year round and contains little suspended sediment. AR 35969. Gravel stream
20 bottoms must have minimal deposited fine sediment because the spaces between pieces of stone
21 allow oxygenated water to sustain eggs and fry. AR 35977.

22 SONCC freshwater habitat has declined in quality and quantity over time, in part due to
23 the impacts of logging. AR 36372-73. In 1997 NMFS listed SONCC coho salmon as threatened
24 under the ESA. *Threatened Status for Southern Oregon/Northern California Coast*

1 *Evolutionarily Significant Unit (ESU) of Coho Salmon*, 62 Fed. Reg. 24588 (May 6, 1997).

2 NMFS identified logging as one of the “major activities responsible for the decline of coho
3 salmon in Oregon and California.” 62 Fed. Reg. at 24592.

4 Logging, timber hauling, and road maintenance and construction can adversely impact
5 SONCC coho salmon by altering stream features that support SONCC coho survival. 62 Fed.
6 Reg. at 24593. Timber harvest activities, including hauling timber and road maintenance, often
7 deliver sediment to streams. *Id.*; AR 37741. Roads are a persistent source of sediment to
8 streams on and downstream of FGS lands. AR 37741; AR 12890-91. Sediment delivered to
9 streams can elevate levels of fine sediments in spawning gravels and suffocate salmon embryos.
10 62 Fed. Reg. at 24593. Sediment can also fill the substrate interstices inhabited by invertebrates,
11 decreasing a primary food supply for juvenile salmon. AR 37742.

12 F. The Fruit Growers Supply Company Habitat Conservation Plan.

13 FGS has intensely logged its lands over the last century. AR 38386; AR 35942. In order
14 to gain access to the owl habitat on its lands that to date has been protected under the ESA and
15 California forestry regulations, FGS developed the habitat conservation plan at issue here and
16 applied for incidental take permits. AR 35942. Fruit Growers’ implementation of the HCP will
17 adversely impact forest ecosystems and the species that live there, including northern spotted
18 owls, SONCC coho salmon, Yreka phlox, Upper Klamath and Trinity Rivers Chinook salmon,
19 Klamath Mountains Province steelhead, golden eagles, peregrine falcons, fishers, and the
20 Siskiyou mountains salamander. AR 35965; AR 38507.

21 **1. The HCP’s Terrestrial Species Conservation Strategy.**

22 Chapter 5.3 of the HCP details Fruit Growers’ “Terrestrial Species Conservation
23 Program” (“TCS”), which includes numerous provisions relating to northern spotted owls. AR
24 36133. The incidental take permits allow FGS to “take” 83 northern spotted owls at 43 site

1 centers. AR 36192. The basic strategy of the TCS is to allow FGS to log large tracts of spotted
2 owl habitat that support owls on its lands in return for (1) preserving relatively small fragments
3 of habitat on FGS land that support spotted owls on nearby federal land; (2) promoting the
4 development and maintenance of foraging and dispersal habitat across FGS ownership over time;
5 and (3) taking other steps to reduce logging-related impacts to owls. AR 36101; AR 36193.

6 a. Conservation Support Areas

7 The primary mitigation measure in the TCS is FGS' commitment to preserve blocks of
8 habitat in 24 owl circles that FGS and FWS determined to have relatively high conservation
9 value. The TCS conserves habitat blocks, known as "Conservation Support Areas" ("CSAs"), in
10 24 owl circles while allowing FGS to log extensively in another 58 owl circles. AR 36200.
11 FWS chose the locations of the CSAs based in part on the "conservation value" it assigned to the
12 owl circles at issue. AR 36193. FWS derived the "conservation value" of the owl circles, which
13 it expressed by assigning points, using a formula that considered five variables: (1) proximity of
14 the spotted owl activity center to designated northern spotted owl critical habitat; (2) the
15 reproductive status and history of the owl circle; (3) the proportion of private land in the core
16 area of the home range; (4) the proportion of private land in the outer ring of the home range;
17 and (5) the predicted probability of occupancy of the home range. AR 36193.

18 FWS' conservation value formula did not include a variable that drove the conservation
19 value of the circles up or down based on the percentage of the land in the circles that is subject to
20 the HCP. AR 36193. Nor did the conservation value formula include a variable based on
21 expected future changes to habitat conditions on non-FGS lands in the owl circles. AR 36193.
22 By failing to account for these variables, the conservation value formula assumed that habitat
23 conditions on non-FGS lands in owl circles would remain the same throughout the permit term
24 even though the HCP does not restrict timber harvest by non-FGS landowners.

1 Although the Forest Service and BLM are not parties to the HCP, AR 35942, FWS’
2 formula assigned relatively high conservation values to owl circles with a high percentage of
3 federal lands because: (1) the formula gave conservation credit to lands near designated critical
4 habitat and all designated critical habitat in the area is on federal lands; and (2) the formula
5 assigned higher conservation value to circles that encompassed smaller percentages of private
6 land. AR 1976-77; AR 17916 (FGS consultant stating “conservation value...almost entirely
7 driven by proximity to CHU [critical habitat units].”). For these same reasons, the formula
8 assigned lower conservation values to owl circles that encompassed higher percentages of private
9 lands. AR 36194-96.

10 FGS and FWS picked the owl circles that would contain CSAs after ranking the owl
11 circles based on their conservation value as dictated by the formula. AR 36198. The nesting
12 areas for nearly all of the northern spotted owls that the FWS expects to be preserved by the
13 CSAs are on lands managed by the Forest Service in the Klamath National Forest. AR 34182-
14 34190. In many of the CSAs FGS lands comprise only a small fraction of the land within the
15 northern spotted owl home range. AR 36137 (showing FGS habitat commitments); AR 36194
16 (showing current amounts of habitat in different ownerships for each owl circle). The end result
17 is this: FGS lands contain approximately 43,000 acres of suitable NSO habitat, AR 36202, but
18 “[o]ver the term of the Permits, nearly all of the currently available habitat for northern spotted
19 owl in the Plan Area could be harvested, with the exception of approximately 7,100 acres.” AR
20 36202. FGS will log most of the owl habitat on its lands in the first decade under the HCP,
21 which will concentrate environmental impacts. AR 36202.

22 The Services’ conservation formula is unique to this HCP and did not receive any formal
23 peer review or approval. Jeffrey Dunk, a biologist from Humboldt State University and co-
24 creator of the probability of occupancy model used in the conservation formula, reviewed the

1 conservation matrix formula. AR 36193. But Professor Dunk had significant critiques of the use
2 of his model to identify conservation sites, pointing out that there was no survey data reliably
3 establishing the reproductive status of the activity centers; that proximity to designated critical
4 habitat is not a strong indicator of conservation value because designated critical habitat often
5 does not correlate with high-quality habitat; and that accounting for percentage of owl habitat on
6 private lands measured impacts to private landowners rather than impacts to owls. AR 1976-77.

7 Professor Dunk's concerns find support in the record. FWS reviewed owl survey data
8 from FGS lands and the surrounding area to determine the reproductive status for each owl
9 circle, but due to a limited survey record FWS reviewed almost no *current* owl survey data. AR
10 34179; AR 17916. Additionally, the model FWS used to predict probability of spotted owl
11 occupancy showed little to no correlation between the selection of CSAs and the probability of
12 occupancy by spotted owls. AR 34179; AR 17923-24 (graph showing no correlation between
13 mitigation sites and occupancy).³

14 The HCP does not place any area on FGS lands completely off-limits to logging. The
15 HCP requires Fruit Growers to promote and maintain certain general conditions and habitat
16 features within each CSA. AR 36134. But the HCP allows logging in the CSAs when those
17 areas meet minimum habitat thresholds and allows salvage logging after fire or insect infestation.
18 AR 36138; AR 36226. As a result, the HCP allows logging in CSAs that would actually result in
19 a significant decrease of nesting and roosting habitat in those areas over the permit term. AR
20 34228 (showing that FGS is authorized to log over 1,000 acres of nesting and roosting habitat
21 within CSAs in the Klamath Province). Logging within CSAs, even if it does not rise to the
22

23 ³ FWS initially requested that FGS prepare this graph as "a visual representation showing
24 that we are capturing the owls sites with some of the best habitat as mitigation sites." AR 17919.
FGS' consultant prepared the graph; discovered there was little correlation; and recommended
omitting the information from public review. AR 17921. FWS did not to publish the information.

1 level of “take,” can still have adverse impacts on the northern spotted owls that reduce the
2 benefits of the CSA. AR 3886 (FWS staff comment: “degradation of habitat within CSAs
3 directly reduces the primary mitigation for a large amount of take.”). Additionally, because the
4 HCP does not require conservation of the CSAs beyond the 50-year permit term, the CSAs and
5 any new habitat that develops could be logged in the future. AR 38921 (“The Services
6 acknowledge that the CSAs could be harvested after the permit expires.”).

7 b. Dispersal habitat

8 The other asserted mitigation measure in the HCP is a supposed decrease in clearcutting
9 on FGS lands (sometimes referred to as “even-aged harvest” or “regeneration harvest”) and a
10 corresponding increase in dispersal habitat. AR 36139. But the HCP does not require FGS to
11 reduce clearcutting or to increase dispersal habitat. AR 36225. Additionally, while the HCP
12 acknowledges that FWS has defined dispersal habitat as “stands with adequate tree size and
13 canopy closure to provide protection from avian predators and at least minimal foraging
14 opportunities,” the HCP contains no criteria regarding what forest conditions constitute dispersal
15 habitat on FGS lands. AR 36139. The HCP has no requirements for how many acres of
16 dispersal habitat FGS will maintain; where FGS will preserve dispersal habitat; or when FGS
17 will preserve dispersal habitat. AR 36139.

18 **2. The HCP’s Aquatic Species Conservation Strategy.**

19 Because some of the rivers on and downstream of FGS lands provide spawning and
20 rearing habitat for SONCC coho and other salmonids, Section 5.2 of the HCP includes an aquatic
21 species conservation strategy (“ACS”) intended to reduce logging-related impacts to SONCC
22 coho, Upper Klamath and Trinity Rivers Chinook salmon, and Klamath Mountains Province
23 steelhead. AR 36102-36133. The ACS has two basic components: 1) institution of a variety of
24 forestry prescriptions to lessen the impacts of logging as they occur, AR 36105; and 2) a

1 requirement that FGS implement a road maintenance program after 10-15 years of HCP
2 implementation. AR 36127.

3 The ACS divides Fruit Growers lands into Class A, Class B, and Class C lands. AR
4 36103. Borrowing heavily from California forestry regulations, the ACS prescribes different
5 limitations on logging activities for each land Class. AR 36105. The ACS prescriptions address
6 a wide variety of logging-related activities, including the maintenance of riparian buffers,
7 logging on steep slopes, timber harvest methods, building and maintenance of stream crossings,
8 and road construction and maintenance. AR 36102-33. The ACS includes monitoring programs
9 to measure some of the impacts of implementation of the prescriptions on salmon habitat. AR
10 36213-14. But the HCP does not include an adaptive management program that requires Fruit
11 Growers to alter management of its lands in response to data about the impacts of logging on
12 listed species. AR 40039. No matter the results of implementation of the HCP, the Services may
13 not require additional commitments of resources from FGS or impose additional restrictions on
14 FGS' activities without FGS' consent due to the No Surprises policy. AR 36247.

15 The ACS also requires Fruit Growers to implement a Road Management Plan on Class A
16 lands, consisting of an initial inventory to document the roads and possible sources of sediment
17 delivery; the development of a plan to reduce potential sediment input to streams by fifty
18 percent; and later implementation of that plan. AR 36127. FGS must complete road inventories
19 within five to ten years of issuance of the incidental take permits and then take steps to reduce
20 the potential for sediment delivery to streams from those roads by fifty percent within ten to
21 fifteen years of issuance of the permits. AR 36127.

22 G. The Services' Issuance of Incidental Take Permits to Fruit Growers.

23 The Services invited public comment on the HCP before issuing the incidental take
24 permits. *See Notice of Public Scoping and Intent to Prepare a Joint Environmental Impact*

1 *Statement* 73 Fed. Reg. 9776 (Feb. 22, 2008); *Multi-species Habitat Conservation Plan*, 74 Fed.
 2 Reg. 58602 (Nov. 13, 2009); *Multi-Species Habitat Conservation Plan*, 77 Fed. Reg. 37656
 3 (June 22, 2012). In response to those invitations KS Wild submitted extensive comments
 4 outlining serious concerns regarding the issuance of incidental take permits in an already
 5 degraded environment. AR 3696-3716 (scoping comments); AR 13262-13318 (comments on the
 6 draft EIS and draft HCP); AR 39179-39198 (comments on the FEIS, BiOp, and final HCP).
 7 State, federal, and tribal governments shared many of KS Wild's concerns and critiques. *See* AR
 8 14113 (comments of California's North Coast Regional Water Quality Control Board); AR
 9 13538-36 (comments of EPA Region IX); AR 3763-3797 (comments of the Karuk Tribe); AR
 10 3811 (comments of the Quartz Valley Tribe).

11 FWS made the findings required by ESA Section 10(a)(2)(B) in November 2012. AR
 12 40121-32. FWS found that "the applicant will, to the maximum extent practicable, minimize and
 13 mitigate the impacts of such taking," 16 U.S.C. § 1539(a)(2)(B)(ii), based on its determinations
 14 that: (1) "[t]he conservation value of the areas conserved under the HCP outweighs the
 15 conservation value of the areas subject to harvest." (AR 40126); (2) "[m]any of the activity
 16 centers where take would be authorized under the ITP are likely not occupied and contribute
 17 little to the survival and recovery of the northern spotted owl." (AR 40127); (3) "[t]he proposed
 18 [CSAs] will provide for the protection and expansion of higher quality habitat on FGS ownership
 19 that would likely not occur under existing regulatory mechanisms governing timber harvest on
 20 FGS ownership." (AR 40127); (4) "[t]he changes in timber management practices identified in
 21 the proposed HCP are expected to result in an increase in northern spotted owl foraging and
 22 dispersal habitat across FGS ownership over the permit term due to a decrease in clearcutting
 23 and other even-aged management practices." (AR 40128); and (5) "[t]he higher costs to the
 24 applicant of conserving additional activity centers on the FGS ownership is not necessary to

1 minimize and mitigate the impacts of take and would provide little additional conservation value
2 for the northern spotted owl.” (AR 40128).

3 FWS also found that the HCP would not cause jeopardy to northern spotted owls, *see* 16
4 U.S.C. § 1539(a)(1)(B)(iv), by incorporating by reference its BiOp. AR 40131; AR 34258.
5 FWS relied heavily on its belief that FGS would decrease clearcutting and increase dispersal
6 habitat across its ownership. AR 34252; AR 34260-61. FWS also relied heavily on the
7 conservation value formula and, in so doing, relied on preservation of forests outside FGS lands
8 over time. AR 34260. FWS explicitly assumed that habitat conditions on lands surrounding
9 FGS lands would persist until 2062 (the end of the permit term), “to avoid speculating on the
10 types of changes that may occur on these lands over time.” AR 34181. Elsewhere in its BiOp
11 FWS described probable habitat declines on those same lands. AR 34194-95.

12 **III. JURISDICTION**

13 This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs have standing to
14 bring their claims. An organization “has standing to bring suit on behalf of its members when its
15 members would otherwise have standing to sue in their own right; the interests at stake are
16 germane to the organization’s purpose; and neither the claim asserted nor the relief requested
17 requires the participation of individual members in the lawsuit. *Friends of the Earth v. Laidlaw*,
18 528 U.S. 167, 181 (2000). For individual members to establish standing the individual must
19 show: (1) an “injury in fact” (2) that is fairly traceable to the challenged conduct of the
20 Defendants and (3) capable of being redressed by a favorable decision from the court. *Natural*
21 *Res. Def. Council v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (citing *Laidlaw*, 528 U.S. at 181).
22 Additionally, the interests sought to be protected must arguably be within “the zone of interests”
23 protected by the statute in question. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397
24 U.S. 150, 153-54 (1970). Plaintiffs have standing for all claims because Defendants’ issuance of

the incidental take permits, and the supporting documents those permits rely on, cause Plaintiffs' members concrete injuries in fact that this Court can redress by invalidating the permits or the agencies' supporting decision documents. *See* the Declarations of Luke Ruediger, George Sexton, Jordan Beckett, Kyle Haines, John Livingston, Rich Nawa, and Monica Bond (concurrently filed). The wildlife and habitat interests at stake are germane to Plaintiffs' purposes and neither the claim asserted nor the relief requested requires the participation of individual members. Finally, because Plaintiffs' claims seek to protect threatened species and their habitat they are clearly within the zone of interests of the ESA and NEPA. *Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079 (9th Cir. 2001) (ESA); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485-86 (9th Cir. 2011) (NEPA).

IV. ARGUMENT

A. Standard of Review.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Section 706 of the Administrative Procedure Act sets the standard of review for the NEPA and the ESA claims in this case. 5 U.S.C. § 706; *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1062 (9th Cir. 2005) (NEPA); *Pac. Coast Fed'n v. BOR*, 426 F.3d at 1090 (procedural ESA claims); *W. Watersheds Project*, 632 F.3d at 496 (substantive ESA claims). Under the APA, "[t]he reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under this standard is "searching and careful," but "narrow." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). A reviewing court may uphold an agency's decision only on the basis of the reasoning found in that decision. *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

1 In evaluating whether an agency action is arbitrary and capricious, the court “is first
 2 required to decide whether the [agency] acted within the scope of [its] authority. This
 3 determination naturally begins with a delineation of the scope of the Secretary’s authority and
 4 discretion.” *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415-416 (1971)
 5 (citations omitted). The U.S. Supreme Court has explained that an agency action is arbitrary and
 6 capricious

7 ...if the agency has relied on factors which Congress has not intended it to
 8 consider, entirely failed to consider an important aspect of the problem, offered an
 9 explanation for its decision that runs counter to the evidence before the agency, or
 is so implausible that it could not be ascribed to a difference in view or the
 product of agency expertise.

10 *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 42-44. An agency relies on “factors which Congress has
 11 not intended it to consider” when it departs from statutory criteria in making decisions.
 12 *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1004-05 (9th Cir. 1998); *City of Sausalito*
 13 *v. O’Neill*, 386 F.3d 1186, 1222-1223 (9th Cir. 2004).

14 B. Statement of Issues.

15 1. Whether FWS’ issuance of the incidental take permit is arbitrary and capricious
 16 because FWS relied on conservation value provided by entities other than “the applicant,”
 17 unenforceable mitigation provisions, an outdated critical habitat designation, and an invalid
 18 BiOp.

19 2. Whether FWS’ BiOp is arbitrary and capricious because FWS relied on
 20 unenforceable mitigation and lacked basis in the record for its findings.

21 3. Whether NMFS’ issuance of the incidental take permit is arbitrary and capricious
 22 because NMFS relied on unenforceable mitigation, failed to explain whether the HCP minimizes
 23 and mitigates to the maximum extent practicable, and relied upon an invalid BiOp.
 24

1 4. Whether NMFS' BiOp is arbitrary and capricious because NMFS failed to
2 analyze short-term impacts to salmonids and relied on unenforceable mitigation.

3 5. Whether the Services' failure to disclose environmental information and
4 consequences of the proposed action pertaining to the economics of Fruit Growers'
5 implementation of the HCP, and the Services' failure to conduct a quantitative analysis of the
6 direct, indirect, and cumulative effects of the proposed action, violates NEPA.

7 6. Whether the Services' failure to disclose and analyze the cumulative effects of
8 timber harvest on nearby public and private lands, the use of herbicides and other chemicals in
9 the project area, and water withdrawals from the project area, violates NEPA.

10 C. The FWS' "Minimize and Mitigate" Finding is Arbitrary and Capricious Because FWS
11 Relied on Conservation Value Provided by an Entity Other Than "The Applicant."

12 The FWS' finding that "the applicant will, to the maximum extent practicable, minimize
13 and mitigate the impacts of [the] taking," *see* 16 U.S.C. § 1539(a)(2)(B)(ii) *and* AR 40126-129,
14 is arbitrary and capricious because FWS "relied on factors which Congress has not intended it to
15 consider." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Specifically, by giving high conservation
16 values to owl circles that encompass an abundance of federal land, and by then crediting FGS
17 with the entire conservation value of those owl circles because FGS committed to maintaining a
18 CSA that comprises a small fraction of the land in the circle, FWS credited FGS for conservation
19 value that someone other than "the applicant" will provide. FWS' "minimize and mitigate"
20 finding is arbitrary and capricious because FWS considered factors Congress did not intend it to
21 consider when it credited FGS for conservation value provided by neighboring landowners.

22 In making the Section 10(a)(2)(B)(ii) finding, FWS may only consider minimization and
23 mitigation measures "the applicant will" take under the HCP. The ESA is unambiguous on this
24 point. In setting forth the contents of an application for an incidental take permit, Section

1 10(a)(2)(A)(ii) requires the applicant to explain “what steps *the applicant will take* to minimize
2 and mitigate” the impacts of the taking. 16 U.S.C. § 1539(a)(2)(A)(ii) (emphasis added).
3 Section 10(a)(2)(B)(ii) then requires FWS to find that “*the applicant will*, to the maximum extent
4 practicable, minimize and mitigate the impacts of such taking.” 16 U.S.C. § 1539(a)(2)(B)(ii)
5 (emphasis added). The applicant is the entity seeking permit coverage, and the word “will”
6 means “the mandatory sense of ‘shall’ or ‘must.’” *Burns v. Alcala*, 420 U.S. 575, 580–581
7 (1975); Black’s Law Dictionary 1433 (5th Ed. 1979). Accordingly, FWS can only evaluate what
8 “the applicant” “must” do under the HCP and determine whether those actions—and only those
9 actions—will minimize and mitigate the impacts of the proposed taking.

10 The Services’ own guidance confirms that the Services may only consider habitat
11 conservation measures that are provided by the applicant and enforceable under the HCP.
12 According to the Services, one of the “few ironclad rules” of mitigation programs is that “that
13 they are manageable and enforceable.” HCP Handbook at 1-16. Where an HCP covers activities
14 implicating multiple owners, the permit-holder must “have the authority to regulate or control all
15 or applicable parts of the HCP program” and “the conditions of the HCP [must be] enforceable.”
16 *Id.* at 3-2 to 3-3. The Services recognize that HCPs may implicate multiple landowners:

17 Some HCPs may involve interests other than the applicant or permittee. In these
18 cases, the applicant must have specific authority over the other parties affected by
19 the HCP and be willing to exercise that authority, or must secure commitments
20 from them that the terms of the HCP will be upheld. In the latter case, agreements
between the FWS or NMFS and the other groups, or legally binding contracts
between the applicant and such individuals or interests, may be necessary to bind
all parties to the terms of the HCP.

21 *Id.* at 7-5 to 7-6.

22 Case law also confirms that FWS can only consider actions that “the applicant will” take.
23 In *Sierra Club v. Babbitt*, the court rejected approval of an HCP where the FWS relied on
24 mitigation provided by non-applicants, holding that “the FWS cannot comply with the strict ESA

1 mandate that the HCP ‘minimize and mitigate’ the effects of the projects to the ‘maximum extent
2 practicable’ simply by relying on speculative future actions of others.” 15 F. Supp. 2d at 1282.
3 By contrast, courts have upheld HCPs where multiple applicants have applied for joint incidental
4 take permits with mutually binding and enforceable mitigation measures. *See Friends of*
5 *Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 984 (9th Cir. 1985); *WildEarth Guardians v.*
6 *U.S. Fish and Wildlife Service*, 622 F.Supp.2d 1155, 1159-60 (D. Utah 2009). These cases all
7 confirm what is clear from the statute: FWS must make its Section 10(a)(2)(B)(ii) finding based
8 only on what “the applicant will” do, not based on what some other entity that is not bound by
9 the permit may or may not do.

10 Section 10’s requirement that the Services may only consider mitigation measures “the
11 applicant” will carry out harmonizes with the broader statutory context. Section 10 functions as
12 a step-by-step framework for the formation of a contract between the applicant and the Services.
13 *See* 16 U.S.C. § 1539(a)(2)(A) (offer); (B) (acceptance); (C) (formation); *see also Plum Creek*
14 *Timber Co., Inc. v. Trout Unlimited*, 255 F. Supp. 2d 1159, 1168 (D. Idaho 2003) (analyzing
15 HCP as a contract in deciding Declaratory Judgment Act claim). Viewed in the contract context,
16 it is appropriate that the Services may only rely on enforceable terms, for only enforceable terms
17 guarantee the Services the benefit of the bargain. Reliance on enforceable mitigation also
18 accords with the statutory mandate to minimize risk to threatened and endangered species, *Sierra*
19 *Club v. Marsh*, 816 F.2d at 1386, and the stated purpose of the ESA that all federal agencies
20 “shall seek to conserve endangered species and threatened species and shall utilize their
21 authorities in furtherance” of that purpose. 16 U.S.C. § 1531(c)(1).

22 FWS’ finding that FGS will minimize and mitigate the impacts of taking 83 northern
23 spotted owls is unlawful because the Service credited FGS for conservation value provided by
24 neighboring landowners even though those neighboring landowners are not “applicants” for the

1 incidental take permits. FGS is the only applicant for the incidental take permits, AR 35942; the
2 only party besides the Services bound by the implementation agreement, AR 40047; and the only
3 party subject to the terms of the incidental take permit, AR 40109. Because FGS is the only
4 “applicant,” FWS may only consider mitigation provided by FGS in determining whether the
5 HCP’s conservation measures adequately compensate for the take of 83 spotted owls. 16 U.S.C.
6 1539(a)(2)(B)(ii). *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted) (“It is
7 well established that ‘when the statute’s language is plain, the sole function of the courts—at
8 least where the disposition required by the text is not absurd—is to enforce it according to its
9 terms.’”)

10 But that is clearly not what the Service did. Instead, FWS gave FGS mitigation credit for
11 all spotted owl habitat in the owl circles where FGS committed to maintaining a CSA even
12 though the vast majority of that habitat is on land that FGS does not own and that is not subject
13 to the HCP. AR 40127. To support its “minimize and mitigate” finding, FWS relied on the
14 “conservation value matrix” that FWS and FGS developed in Chapter 6 of the HCP. AR 40127;
15 *see* AR 36193-361200. While the matrix is complicated, examining how it operates reveals that
16 FWS gave FGS mitigation credit for conserving entire owl circles even where FGS will at best
17 preserve only tiny fractions of those circles, based on its assumption that surrounding landowners
18 will preserve the habitat in those areas for the entire length of the permit term.

19 To make its “minimize and mitigate” finding FWS compared the conservation value of
20 the owl circles containing CSAs to the conservation value of the owl circles in which FGS can
21 log. AR 36193-96. FGS and FWS first added up the conservation value of all of the owl circles
22 to produce a regional conservation value total. AR 36198. To determine the conservation value
23 of the 24 owl circles supported by the CSAs, FWS then divided the total regional conservation
24 value by the value of the circles supported by the CSAs. AR 36198. Using that approach, FWS

1 determined that: 1) the conservation value of the owl circles supported by CSAs comprises 55
2 percent of the total conservation value in the area; 2) the conservation value of the owl circles in
3 which FGS can freely log but will not cause take comprises 27 percent of the total; and 3) the
4 conservation value of the owl circles in which FGS' logging will cause take comprises 18
5 percent of the total. AR 36200. FWS then adopted this analysis as the basis for its Section
6 10(a)(2)(B)(ii) finding. AR 40127 (finding that the HCP minimizes and mitigates take to the
7 maximum extent practicable because "the activity centers protected by the CSAs contribute
8 approximately 55 percent of the total conservation value in the area of impact").

9 FWS departed from the statutory criteria that required it to find that "the applicant will"
10 minimize and mitigate the impacts because it attributed the entire conservation value of
11 numerous owl circles to FGS even though FGS will preserve only small amounts of habitat in
12 those circles. FGS received conservation credit for the entire circle when in fact, if any benefit is
13 provided at all, the vast majority of it will be provided by the other landowners in the circles,
14 primarily the Forest Service.

15 Drilling down on one owl circle reveals the irrationality of FWS' analysis. In the owl
16 circle labeled SK238, the HCP requires FGS to temporarily preserve zero acres of habitat in the
17 core nesting and roosting area and 66 acres of habitat in the outer ring, comprising less than 2
18 percent of the total owl circle. AR 36137; AR 36412 (map showing FGS land as sliver on far-
19 right side of circle). Despite FGS' marginal contribution, and despite the fact that the Forest
20 Service controls over 2,400 acres of habitat in that owl circle, AR 34184, FWS credited FGS
21 with 111 "conservation value" points (the total conservation value of the circle) when
22 determining whether FGS mitigated the impacts of take to the maximum extent practicable. AR
23 36194. According to FWS, the conservation value of FGS preserving 66 acres in SK238 (111
24 points) outweighs the conservation value lost by logging in 23 other owl circles (102 points in

total), *even though FGS' logging in those 23 owl circles will eliminate 18,875 acres of suitable owl habitat and take approximately 40 northern spotted owls.*⁴

SK238 is just one example among many. For 13 of the 24 CSA's, the CSAs comprise less than 10 percent of the total area of the owl circle. AR 36137. For 17 of the 24 CSA's, the CSA comprise less than 15 percent of the total area of the owl circle. AR 36137. Based on those percentages, under the HCP's own criteria, AR 36191-92, the decision to log or protect those 17 CSAs will neither cause nor prevent take. Yet in each instance FWS gave FGS credit for preserving the entire owl circle. AR 36195-95.

The flaws in the accounting system drew internal criticism at FWS. Brian Woodbridge, regional Northern Spotted Owl Recovery Chair for FWS, specifically reviewed FGS' mitigation in a different owl circle, SK099. AR 7728. FGS commits to protecting 1 acre of suitable habitat in the core area and 305 acres overall, yet FWS gave FGS 100 points of mitigation credit. *See* AR 36137; AR 34183. Mr. Woodbridge called FGS' commitments "ludicrous" and "illusory," asking "why bother calling it conservation." AR 7728.

After wading through the complex formulas, pie charts, and tables, FWS' "minimize and mitigate" finding boils down to these key facts: the HCP requires FGS to preserve very little habitat on its lands and allows FGS to log more than 80 percent of the suitable owl habitat on its property, AR 36202, based on the premise that temporarily preserving small amounts of habitat will have a huge conservation benefit because those lands are near habitat on Forest Service lands. Giving FGS credit for conservation value provided by the Forest Service renders FWS'

⁴ The sum of the conservation value for the 23 least "valuable" owl circles where take will occur is 102. AR 36195-96. The 23 take sites are SK333, 369, 467, 358, 364, 360, 368, 361, 475, 363, 534, 046, 450, 365, 391, 309, 205, 454, 474, 389, 388, 533, and 473. *Id.* Table 7 in the FWS Biological Opinion shows how many acres of habitat are currently on FGS lands in each owl circle. AR 34182-91. There are 18,875 acres of owl habitat total in the 23 owl circles where take will occur under the HCP. *Id.*

1 minimize and mitigate finding unlawful because it takes into account actions taken by a party
2 other than “the applicant,” which is a factor “Congress has not intended it to consider.” *Motor*
3 *Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

4 Additionally, the FWS’ “minimize and mitigate” finding is arbitrary and capricious
5 because there is no “rational connection between the facts found and the conclusions made.” *Or.*
6 *Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). The 7,100 acres of CSAs are
7 temporary conservation efforts: logging can occur in CSAs during the permit term and FGS can
8 log them in their entirety after the HCP expires. AR 34228; AR 38921. FWS’ finding that the
9 conservation value of the 7,100 acres in CSAs “outweighs the conservation value” of the 36,626
10 acres of spotted owl habitat subject to harvest, AR 40126, is arbitrary and capricious because
11 there is no credible explanation for how temporarily preserving 7,100 acres outweighs the
12 impacts of permanently destroying 36,626 acres of a threatened species’ habitat. AR 5860 (FWS
13 staff comment on draft HCP: “It is far from clear how managing 10,000 acres mitigates for
14 adversely affecting (in the initial years of the permit) almost 3x’s that acreage over the permit
15 term. So may have an MEP [maximum extent practicable] issue.”); *c.f. Nat’l Wildlife Fed’n v.*
16 *Norton*, 2005 WL 2175874 at *14 (upholding HCP with mitigation ratio of .5 to 1, where
17 mitigation land held in permanent reserves).

18 Moreover, while the CSA selection and conservation value analysis was driven almost
19 entirely by proximity to critical habitat, AR 17916, FWS adopted a revised critical habitat
20 designation prior to permit approval and failed to provide any analysis of the impact of that
21 revision on the Section 10 findings. *See* 77 Fed. Reg. 71876 (Dec. 4, 2012) (stating that FWS
22 submitted revised critical habitat prior to court-ordered deadline of Nov. 21, 2012); AR 40121
23 (permit issuance on Nov. 27, 2012). Finally, FWS’ finding that “[t]he higher costs to the
24 applicant of conserving additional activity centers on the FGS ownership is not necessary to

1 minimize and mitigate the impacts of take...,” AR 40128, is arbitrary and capricious because, by
 2 crediting FGS for conservation value it was not providing, FWS greatly overstated the benefits
 3 of FGS’ conservation efforts and greatly understated the impacts of FGS logging on spotted
 4 owls. Clearly FGS could have done more to minimize and mitigate its impacts on spotted owls.
 5 *See Nat’l Wildlife Fed’n v. Babbitt*, 128 F. Supp. 2d at 1292.

6 D. The FWS’ Minimize and Mitigate Finding Is Arbitrary and Capricious Because FGS’
 7 Promise to Reduce Clearcutting is Illusory and Unenforceable.

8 FWS’ Section 10(a)(2)(B)(ii) finding is also arbitrary and capricious because it relies on
 9 an illusory FGS promise “to promote” an increase in dispersal habitat across its lands by
 10 reducing clearcutting. But the HCP does not require FGS to reduce clearcutting or to increase
 11 dispersal habitat, nor does the HCP provide any means to measure whether FGS is actually
 12 accomplishing those goals. The ESA does not allow FWS to make the Section 10(a)(2)(B)(ii)
 13 finding based on just good intentions. It requires FWS to find that “the applicant *will*” take the
 14 steps required to minimize and mitigate the impacts of the taking to the maximum extent
 15 practicable. 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added). FWS’ reliance on expected
 16 decreases in clearcutting is unlawful because the HCP does not require FGS to reduce
 17 clearcutting or to increase dispersal habitat across its lands.

18 In *Sw. Ctr. for Biological Diversity*, 470 F. Supp. at 1140, the court rejected FWS’
 19 issuance of an incidental take permit based on the applicant’s commitments to “avoid” vernal
 20 pool habitat “to [the] maximum extent practicable.” The court reasoned that reliance on
 21 avoidance measures as mitigation was unlawful because open-ended commitments to “avoid”
 22 areas are unmeasurable and unenforceable. *Id.* As a result, the court found that “the duty to
 23 ‘avoid’ vernal pools is toothless” and that “passing, undefined references to ‘avoidance’ do not
 24 satisfy the ESA.” *Id.* at 1141 (citing *TVA v. Hill*, 437 U.S. at 174).

1 In making the “minimize and mitigate” finding at issue here, FWS relied on its finding
2 that “changes in timber management practices in the proposed HCP are expected to result in an
3 increase in northern spotted owl foraging and dispersal habitat across FGS ownership over the
4 permit term due to a decrease in clearcutting and other even-aged management practices.” AR
5 40140; AR 40128. That finding is undermined by FGS’ plan to log over 36,000 acres of spotted
6 owl habitat during the permit term. Indeed, the only assurance in the HCP regarding reduction of
7 clearcutting is the statement that “FGS will *promote* forest management practices that develop
8 and maintain dispersal habitat across its ownership to provide connectivity between the CSAs
9 and nearby federal lands.” AR 36139 (emphasis added).

10 The promise to “promote” certain forest practices, like the promise to “avoid” vernal
11 pools, is unenforceable. *See Sw. Ctr. for Biological Diversity*, 470 F. Supp. 2d at 1140. The
12 HCP does not impose an obligation to reduce clearcutting or to increase dispersal habitat, much
13 less require FGS to replace the tens of thousands of acres of foraging habitat it will log during
14 the permit term. AR 34260 (“Implementation of the FGS HCP is anticipated to result in a ... 31
15 percent reduction in foraging habitat from current levels...”). Similarly, the HCP has no criteria
16 by which to measure what constitutes dispersal habitat; the conservation value of dispersal
17 habitat to the owl; whether forests provide the intended dispersal function; how many acres of
18 dispersal habitat will be provided; where those acres will be located; or when they will exist. *See*
19 AR 5762 (FWS staff conceding that “[n]ot having an accounting system for dispersal habitat is a
20 vulnerability”). The HCP simply has no mechanism for FWS or the public to enforce or monitor
21 promises to increase dispersal habitat. Indeed, the HCP expressly states:

22 Because FGS will maintain a forested landscape on its ownership, the biological
23 objective for dispersal habitat will be met. No compliance monitoring or
24 additional reporting is required to document compliance with this measure.

1 AR 36225. But the conclusion that any “forested landscape” constitutes dispersal habitat is flat
 2 wrong. *See* AR 38942 (“The Services agree...that...stating ‘almost any forested landscape can
 3 provide dispersal opportunities’ for northern spotted owl is an oversimplified, if not incorrect,
 4 characterization of dispersal habitat.”). The lack of actual requirements or compliance
 5 monitoring renders any assurances that FGS will increase dispersal habitat unenforceable. As in
 6 *Sw. Ctr. for Biological Diversity*, the commitment to “promote” different forest management is
 7 “toothless.” 470 F. Supp. 2d at 1140. Reliance upon that supposed commitment renders FWS’
 8 Section 10(a)(2)(B)(ii) finding invalid because the HCP does not ensure that “the applicant *will*”
 9 reduce clearcutting and increase dispersal habitat across its lands.

10 E. The FWS’ Reliance on FGS’ Unenforceable Promise to Reduce Clearcutting Renders the
 11 “No Jeopardy” Findings FWS Made in its Biological Opinion and Under Section
 12 10(a)(2)(B)(iv) Arbitrary and Capricious.

13 FWS’ reliance on FGS’ unenforceable promise to promote reductions in clearcutting also
 14 renders its “no jeopardy” findings arbitrary and capricious. FWS’ reliance on voluntary and
 15 unenforceable mitigation measures plainly violates the ESA’s requirement that agencies rely
 16 only on mitigation measures that are enforceable under the ESA.

17 In *Nat. Wildlife Fed’n v. NMFS*, 524 F.3d at 935-936, the U.S. Court of Appeals for the
 18 Ninth Circuit reviewed a BiOp in which NMFS relied on an action agency’s intention to mitigate
 19 impacts from building a dam by installing fish passage structures “where feasible.” The court
 20 invalidated the BiOp because it was “not persuaded that even a sincere general commitment to
 21 future improvements may be included in the proposed action in order to offset its certain
 22 immediate negative effects, absent specific and binding plans.” *Id.*; *see also Ctr. for Biological*
 23 *Diversity v. Bureau of Land Mgt*, 698 F.3d at 1117 (“a conservation agreement entered into by
 24 the action agency to mitigate the impact of a contemplated action on a listed species must be

1 enforceable under the ESA to factor into the FWS' biological opinion as to whether an
 2 action...is likely to jeopardize the continued existence of a listed species...").

3 In its BiOp, FWS expressly and repeatedly relies on expected increases in foraging and
 4 dispersal habitat to make its finding that implementation of the HCP will not jeopardize the
 5 species or adversely modify critical habitat. *See, e.g.*, AR 34241 (concluding in BiOp that "[a]n
 6 important aspect of the HCP is the ownership-wide increase in foraging and dispersal habitat that
 7 is predicted to occur due to changes in FGS's management practices."); AR 34249 (concluding
 8 that loss of owl habitat will be mitigated by increase in foraging habitat); AR 34252 (same); AR
 9 34260-61 (same). FWS justifies its reliance by referencing two potential sources of a
 10 requirement to increase dispersal habitat: (1) California Forest Practices Rules requiring timber
 11 companies to adopt maximum sustained production plans and (2) "page 2-18 of the Final EIS."⁵
 12 AR 34215-16; AR 34241. But the FEIS and relevant California Forest Practices Rules do not
 13 require FGS to increase dispersal habitat on its lands and, moreover, they are unenforceable
 14 under the ESA.

15 FEIS page 2-17 states:

16 Issuance of the ITPs would allow the applicant to harvest more of the currently
 17 suitable northern spotted owl habitat on its ownership. The applicant has indicated
 18 that this would reduce the amount of even-aged regeneration harvest
 19 (clearcutting) necessary to meet financial targets... Under the Proposed Action, it
 is anticipated that there would be about a 10 percent decrease in acres harvested
 each decade, including as much as a 25 percent decrease in even-age regeneration
 harvest (clear cuts) compared to the No Action Alternative.

20 AR 38400. This statement does not create a requirement because it is based entirely on what the
 21 applicant "has indicated" and because environmental impact statements are not enforceable
 22 elements of the HCP. AR 36133 (HCP stating that Chapter 5.3 of the HCP "reflect[s] all the

23 ⁵ This appears to be a typographical error, as page 2-18 of the FEIS concerns road
 24 management practices. *See* AR 38401. It appears that FWS was referencing page 2-17, which
 discusses timber management and Maximum Sustained Production ("MSP"). *See* AR 38400.

1 binding, enforceable commitments FGS will make to satisfy the requirements of Section 10(a) of
2 the Endangered Species Act.”). Moreover, the EIS plainly states that reducing clearcutting is
3 based on whether FGS can do so and still meet “financial targets.” But those targets are not
4 disclosed anywhere in the record and there are no compliance measures in place to determine
5 whether or when FGS will have met its “financial targets” such that it must begin reducing
6 clearcutting. FWS’ reliance on the FEIS is fatally flawed because the FEIS does not demonstrate
7 that FGS will in fact reduce clearcutting, nor does it impose any such requirement on FGS.⁶

8 FWS also erroneously relies on the FGS “MSP analysis.” AR 38701. MSP is the
9 abbreviation for “Maximum Sustained Production,” a calculation the California Forest Practices
10 Rules require timber companies to develop. *See* 14 C.C.R. § 913.11. Under California law, the
11 timber producer must put forth a plan “balancing growth and harvest over time.” 14 C.C.R. §
12 913.11(a)(2). However, the “the yield of timber products” is “specified by the landowner,” and
13 may be revised at any time. 14 C.C.R. § 913.11(a)(1); *see also* AR 499 (FGS stating that the
14 MSP “did not include any specific modeling relating to the HCP’s Proposed Action.”). Here
15 again, FWS reliance on FGS’ MSP analysis is erroneous because that analysis does not require
16 FGS to reduce clearcutting or increase dispersal habitat during the life of the HCP. In fact, the
17 MSP analysis in the record shows that the opposite will occur—FGS plans to increase
18 clearcutting over the next decade. AR 2120.

19 Nothing in the HCP or BiOp requires FGS to increase dispersal habitat over the permit
20 term. No other document or regulation requires FGS to increase dispersal habitat over the permit
21 term, and even if it did, reliance on mitigation that is not enforceable under the ESA renders a

22 ⁶ To the extent that FWS relied on financial targets, the 2007 MSP analysis, or an updated
23 MSP analysis as part of the FGS application for an incidental take permit, FWS violated ESA
24 Section 10(c), which requires the Secretary to publish notice of the application in the Federal
Register and make all of the application available for public notice and comment. 16 U.S.C.
1539(c); *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002).

1 BiOp invalid. *Ctr. for Biological Diversity v. Bureau of Land Mgt*, 698 F.3d at 1117. FWS’
 2 reliance on voluntary and unenforceable mitigation renders its “no jeopardy” determinations
 3 under ESA Section 10(a)(2)(B)(iv) and Section 7(a)(2) arbitrary and capricious. *Nat’l Wildlife*
 4 *Fed’n v. NMFS*, 524 F.3d at 935-936.

5 FWS’ reliance on increases in foraging and dispersal habitat is also fatal to FWS’ finding
 6 that implementation of the HCP will not destroy or adversely modify critical habitat. 16 U.S.C.
 7 § 1536(a)(2); AR 34261. Many of the owl circles in which FGS is authorized to log border on
 8 critical habitat and FGS anticipates carrying out most of that logging in the first decade of
 9 implementation. AR 39-40 (maps showing owl circles before and after implementation of the
 10 HCP); AR 34249 (stating expectation that FGS will log over 17,000 acres of habitat in first
 11 decade). FWS acknowledged that logging under the HCP will degrade critical habitat “by
 12 creating fragmentation and ‘edge effects’ along the boundaries of FGS lands and adjacent critical
 13 habitat,” but ultimately concluded there will be no adverse modification of critical habitat
 14 because “implementation of the FGS HCP will reduce this contrast during the 50-year permit
 15 term as stands develop as forecasted in the MSP modeling.” AR 34261. FWS’ analysis is
 16 arbitrary and capricious because: 1) MSP modeling is not enforceable, *see supra*; 2) impacts to
 17 critical habitat are site-specific, yet nothing in the HCP governs the location of any foraging or
 18 dispersal habitat that FGS may develop as mitigation; 3) FWS’ analysis was based on a critical
 19 habitat designation that became outdated before permit issuance; and 4) FWS’ long-term analysis
 20 ignores short-term impacts to the species, *see Pac. Coast Fed’n v. NMFS*, 265 F.3d at 1037-38.

21 F. The FWS’ “No Jeopardy” Findings Are Arbitrary and Capricious Because FWS Relied
 22 on the Incorrect Assumption that Forests Surrounding FGS Lands Will Remain
Unchanged During the 50-year Permit Term.

23 FWS’ “no jeopardy” findings are also arbitrary and capricious because to make them
 24 FWS assumed that northern spotted owl habitat outside of FGS lands would persist unchanged

1 for the entire 50-year permit term even though FWS' own BiOp predicts significant declines in
2 spotted owl habitat on surrounding Forest Service lands due to logging, fire, disease, and
3 competition from barred owls. A BiOp is arbitrary and capricious if it rests on internally
4 inconsistent assumptions. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010).
5 FWS' biological opinion analyzed the landscape surrounding FGS lands using habitat data from
6 2005, AR 36191, and assumed those habitat conditions would persist until 2062 (the end of the
7 permit term), "to avoid speculating on the types of changes that may occur on these lands over
8 time." AR 34181. FWS then measured the impacts of implementation of the HCP over the
9 permit term and found that the impact of FGS' logging on local and regional owl populations
10 would be small. AR 34245; AR 34246. Based in part on the assumption that habitat conditions
11 will remain unchanged from 2005 conditions on nearby lands, FWS also concluded that the 24
12 owl circles that contain CSAs will continue to have sufficient habitat on non-FGS lands to
13 support spotted owls over the 50 year permit term. AR 34247.

14 In fact, spotted owl habitat in the Action Area is declining and will continue to decline
15 significantly, as FWS concedes elsewhere in its BiOp. The BiOp notes: "[t]hreats to the
16 northern spotted owl in this region include habitat loss due to fires, Federal and private
17 management activities, displacement by barred owls, forest health (insect outbreaks and disease),
18 and potential for avian disease." AR 34194. The BiOp then documents that fire alone
19 eliminated more than 71,600 acres of suitable habitat in the Klamath province over a recent 13-
20 year period. AR 34195. The BiOp also documents that from 1994-2007 logging and natural
21 disturbance eliminated 5.2 percent of the nesting and roosting habitat on federal lands in the
22 California Klamath Province. AR 34194-95. It also recognizes that logging occurs on the
23 approximately 25,000 acres of suitable NSO habitat on private lands in the Area of Impact and
24

1 concedes that “it can be expected that commercial timber harvest will continue in the future.” AR
2 34257.

3 The Forest Service lands on which FWS relies so heavily are simply not protected habitat
4 reserves. The Forest Service manages its lands according to a statutory multiple use mandate
5 that requires timber extraction, 16 U.S.C. § 1604(e), and it routinely logs northern spotted owl
6 critical habitat. *See, e.g., Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048 (9th Cir. 2013)
7 (denying preliminary injunction on 13,830 acre timber sale, including 544 acres of spotted owl
8 critical habitat); *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*,
9 615 F.3d 1122 (9th Cir. 2010) (documenting loss of 3,736 acres of suitable owl habitat in fire
10 event and upholding timber sale of additional 618 acres); *Or. Nat’l Res. Council v. U.S. Bureau*
11 *of Land Mgmt.*, 470 F.3d 818 (9th Cir. 2006) (overturning environmental assessment after
12 completion of timber sale in spotted owl critical habitat).

13 Spotted owl habitat in the Action Area is declining and it is doing so at an accelerating
14 rate. Barred owls, which render habitat inhospitable to spotted owls and which FWS has
15 recognized as a “significant additional threat to spotted owl conservation,” 77 Fed. Reg. 14063,
16 “are predicted to become established in the Action Area within 5 years.” AR 34196; AR 34201.
17 Due to the impacts of climate change, plantation forestry, and fire suppression regimes, fires are
18 burning with increasing intensity and size. AR 34225; AR 34195. Increasing winter
19 temperatures have already resulted in increasing range of invasive insect pests that harm forest
20 health. AR 14253-54. Regardless of the cause, it is certain that habitat amounts and conditions
21 on lands near FGS lands will *not* remain static for the next fifty years.

22 FWS’ inconsistent analysis is similar to the analysis the Ninth Circuit rejected in *Wild*
23 *Fish Conservancy*, 628 F.3d at 527-28. In *Wild Fish Conservancy*, FWS found that operation of
24 a dam had caused declines in the local bull trout population for nearly 70 years. *Id.* Yet

1 elsewhere in the BiOp, FWS found that continued operation of the dam was “not likely to change
 2 the current distribution of the bull trout in the action area.” *Id.* The court invalidated the BiOp
 3 due to FWS’ reliance on conflicting findings to reach its conclusion, holding that FWS failed to
 4 articulate a rational connection between the facts found and the conclusions made. *Id.* at 527.

5 FWS’s contradictions here likewise compel invalidation of the BiOp. The BiOp
 6 documents a steady decline of owl habitat on public and private lands in the Klamath region. AR
 7 34194-95. Yet in analyzing local and regional impacts of FGS’ logging and arriving at a “no
 8 jeopardy” conclusion, FWS assumed that spotted owl habitat conditions on tens of thousands of
 9 acres in the Klamath National Forest will remain unchanged during the 50-year permit term. AR
 10 34181. By assuming that the amount and quality of habitat on Forest Service lands will remain
 11 unchanged when in fact FWS knows it will decline over time, the agency over-estimated the
 12 conservation value of FGS conservation efforts *and* under-estimated the impacts FGS logging
 13 will have on regional spotted owl populations. Both errors undermine the validity of FWS’ “no
 14 jeopardy” findings. Because the agency relied on conflicting findings the BiOp is arbitrary and
 15 capricious. *Wild Fish Conservancy*, 628 F.3d at 527.

16 G. NMFS’ “No Jeopardy” Findings are Arbitrary and Capricious Because NMFS Did Not
 17 Evaluate Short-Term Impacts to Fish at a Sufficiently Specific Spatial Scale.

18 NMFS’ BiOp is invalid because NMFS failed to evaluate impacts to SONCC coho on a
 19 timeline that reflects their life cycle and migration patterns, and made generalized assessments of
 20 habitat impacts rather than providing stream or site-specific analysis. Biological opinions must
 21 evaluate impacts to fish as they actually occur: using a time-scale that reflects the life cycles of
 22 the fish being evaluated and at a spatial scale that reflects site-specific conditions. *Pac. Coast*
 23 *Fed’n v. NMFS*, 265 F.3d at 1037-38 (BiOp analyzing impacts to salmon on a 10-year scale at
 24 the watershed level is invalid because “[t]his generous time frame ignores the life cycle and

1 migration cycle of anadromous fish” and because “assuming away site-specific degradations that
2 could lead to a jeopardy finding contradicts the purpose of ESA and is arbitrary.”)

3 SONCC have a three-year life cycle, AR 37658, but NMFS conducted no analysis of
4 impacts on the three to five year scale and no stream- or site-specific analysis. NMFS instead
5 based its “no jeopardy” finding on its conclusion that logging under the HCP would generally be
6 better than logging under California’s forest practices rules across the FGS landscape. NMFS
7 relied on a general conclusion that “over the duration of the 50-year permit, improvements to
8 habitat will occur” relative to California forest practices regulations. NMFS AR 150905-06; AR
9 37783; *see also* AR 37745 (“Impacts to salmonids or designated critical habitat could occur
10 during the period between permit issuance and treatment if road sites fail and deliver
11 sediment...However, we believe sediment delivery will occur at lower rates and quantities
12 within the first 15 years.”). For three watersheds, NMFS conducted cursory analysis of impacts
13 occurring over the first ten years of implementation on a broad watershed scale. AR 37749. But
14 even there, NMFS failed to analyze impacts at a sub-watershed scale and declined to analyze
15 short-term impacts because “[t]he timeframe for harvesting cannot adequately be predicted as the
16 lumber economy plays a significant factor in the statewide timber harvest rates.” *Id.*

17 NMFS’ failure to analyze short-term impacts at a sufficiently specific scale is closely
18 analogous to the analysis overturned in *Pac. Coast Fed’n v. NMFS*. There, as here, NMFS
19 concluded that long-term mitigation would outweigh short-term impacts of logging to SONCC
20 coho. *Pac. Coast Fed’n v. NMFS*, 265 F.3d at 1037-38. The Ninth Circuit rejected such analysis:

21 The NMFS predicts that more trees will grow within the watershed during the
22 ensuing decade than are cut in the proposed project and, therefore, concludes that
23 the “short-term” and “localized” effects of the logging will be naturally mitigated
24 by regrowth. This optimism may be justified for the purpose of counting trees, but
for the purpose of counting anadromous fish, it is wholly unrealistic.

1 *Id.* Here, once again, NMFS has disregarded the court of appeal’s “clear instruction that
 2 NMFS ‘must consider near term habitat loss to populations with short life cycles.’” *Nat’l*
 3 *Wildlife Fed’n v. NMFS*, 524 F.3d at 934 (citing *Pac. Coast Fed’n v. BOR*, 426 F.3d at
 4 1094). NMFS’ “no jeopardy” findings are fatally flawed because NMFS failed to
 5 adequately analyze impacts on the timescale that matters most: the life-cycle of the
 6 affected fish. SONCC have a three-year life cycle, and considering the impact to salmon
 7 over a ten year or longer period “entirely fail[s] to consider an important aspect of the
 8 problem.” *Pac. Coast Fed’n v. BOR*, 426 F.3d at 1094 (citing *Motor Vehicle Mfrs. Ass’n*,
 9 463 U.S. at 43); *Pac. Coast Fed’n v. NMFS*, 265 F.3d at 1037; *Nat’l Wildlife Fed. v.*
 10 *NMFS*, 524 F.3d at 934-35. An agency does not avoid the likelihood of jeopardy to a
 11 listed species when it disregards the life cycle of the species in crafting the measures
 12 designed to protect it. *Pac. Coast Fed’n v. BOR*, 426 F.3d at 1094.

13 H. NMFS “Minimize and Mitigate” and “No Jeopardy” Findings Are Arbitrary and
 14 Capricious Because NMFS Relied on Voluntary and Unenforceable Mitigation.

15 Like FWS, NMFS violated the ESA by relying on voluntary and unenforceable
 16 mitigation in its no jeopardy findings. The “proper course” is for the Services to “exclude
 17 [unenforceable measures] from the analysis and consider only those actions that are in fact under
 18 agency control or otherwise reasonably certain to occur.” *Nat’l Wildlife Fed’n v. NMFS*, 524
 19 F.3d at 936 n. 17; *see also CBD v. BLM*, 698 F.3d at 1117; *Sw Ctr. for Biological Diversity*, 470
 20 F. Supp. at 1141; *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 350-51 (E.D.
 21 Cal. 2007); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1151–53 (D. Ariz.
 22 2002). Here, however, NMFS relied on numerous voluntary and unenforceable provisions,
 23 rendering its “no jeopardy” findings arbitrary and capricious.

1 First, NMFS erroneously relied on the notion that FGS will increase protections for fish
2 in response to monitoring results. In *Natural Res. Def. Council v. Kempthorne*, the court
3 considered an “adaptive management” plan that required the agency to go through a process to
4 determine whether further environmental protections were necessary to protect listed species.
5 Reliance on the adaptive management plan violated the ESA because “[a]lthough the *process*
6 must be implemented by holding meetings and making recommendations, nothing requires that
7 any *actions* ever be taken.” 506 F. Supp. 2d at 350-51 (emphasis in original).

8 Here, NMFS explicitly found that FGS met the “minimize and mitigate” requirement
9 because the “monitoring programs described in the HCP will assist in determining if and when it
10 is necessary to change the plan’s conservation measures to achieve the plan’s biological
11 objectives.” NMFS AR 150906. NMFS likewise repeatedly relied on the monitoring program in
12 the BiOp to make its no jeopardy determination. AR 37738-39 (reliance on response to
13 temperature monitoring); AR 37748 (reliance on response to sediment monitoring).

14 But the monitoring program requires no actual action in response to any monitoring
15 results. If stream temperatures rise in conjunction with FGS logging, the monitoring program
16 requires only “further assessment.” AR 36215. Sediment increases will be documented in
17 reports, assessments, and trend analysis, but the monitoring program sets no thresholds and
18 requires no action. AR 36219-22. Nor can NMFS impose more protective conservation
19 measures on FGS in response to monitoring results. NMFS granted FGS “no surprises”
20 assurances, so if additional conservation and mitigation measures are deemed necessary to
21 respond to changed circumstances, NMFS lacks authority to require any conservation and
22 mitigation measures beyond those provided for in the plan without the consent of the permittee.
23 50 C.F.R. § 222.307(g)(2)-(3); *see also* AR 36247 (HCP stating that the Services may not require
24 any additional mitigation from FGS).

1 Just as in *Kemphorne*, the HCP requires a process, but no action, in response to
2 effectiveness monitoring. As a result, any changes in response to the monitoring program are
3 unenforceable under the ESA and reliance on the monitoring program in the Section 10 findings
4 and BiOp renders those decisions arbitrary and capricious. 506 F. Supp. 2d at 356; *see also CBD*
5 *v. BLM*, 698 F.3d at 1117.

6 Second, NMFS relied on many aspirational and unenforceable assurances from FGS that
7 are virtually identical to the promises to “avoid” vernal pool habitat that were rejected in *Sw. Ctr.*
8 *for Biological Diversity*, 470 F. Supp. 2d at 1141. In making its “no jeopardy” finding, NMFS
9 notes the impacts of roads on FGS lands and repeatedly relies on the fact that FGS “anticipates”
10 decommissioning old roads and not building many new ones. AR 37739; AR 37750; AR 37744.
11 Similarly, the BiOp relies on the expectation that “the HCP road management plan will result in
12 the gradual reduction of active road mileage across the plan area.” AR 37744. But the HCP
13 does not require FGS to decommission any roads or impose concrete limits on new road
14 construction. Rather, the HCP only states that “FGS will use existing roads *whenever feasible*,
15 *strive* to minimize total mileage, *minimize* disturbance to natural features, *avoid* wet areas and
16 unstable areas, and *minimize* the number of watercourse crossings.” AR 36173 (emphasis added).
17 Indeed, the road management plan is a collection of existing California forest practices
18 regulations, most of which only apply where “feasible.” *See, e.g.*, AR 36334 (“FGS will utilize
19 existing roads whenever feasible...”); AR 36338 (“To the extent feasible, new roads will be
20 constructed so the road network will not drain directly into watercourses...crossings shall be
21 kept to a feasible minimum).

22 The HCP’s directives to “avoid,” “strive,” “minimize,” or to take action only when
23 “feasible” may provide conservation benefits or they may not. But if not, NMFS lacks any
24 power to enforce such assurances because they are entirely left to the unilateral interpretation and

discretion of FGS. NMFS' reliance on assurances that a permittee will carry out environmental protections "if feasible" is arbitrary and capricious and renders its biological opinion arbitrary and capricious. *Nat'l Wildlife Fed. v. NMFS*, 524 F.3d at 936 (invalidating BiOp that relied on mitigation the agency would implement if "feasible").

I. NMFS' Minimize and Mitigate Finding is Arbitrary and Capricious Because Reducing Impacts Does Not Mean that FGS Will Minimize and Mitigate Impacts to the Maximum Extent Practicable.

NMFS' finding that the HCP minimizes and mitigates the impacts "to the maximum extent practicable," 16 U.S.C. § 1539(a)(2)(B)(ii), is arbitrary and capricious because there is no rational connection between NMFS' finding that implementation of the HCP will cause decreasing levels of take over time and NMFS' conclusion that implementation of the HCP will minimize and mitigate take to "the maximum extent practicable." Neither the ESA nor the Services' implementing regulations define "maximum extent practicable." However, the HCP Handbook states that the finding "typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant." HCP Handbook at 7-3; *Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp. 2d 920, 927 n. 11 (E.D. Cal. 2004).

Here, NMFS's primary basis for concluding that the HCP minimizes and mitigates to the maximum extent practicable is NMFS' finding that FGS' logging will cause decreasing levels of take over the 50-year permit term, resulting in gradual habitat improvements relative to the severely degraded status quo. NMFS AR 150906. But although conservation groups, the Karuk Tribe, AR 3763-3797, the U.S. EPA, AR 13530, and California's North Coast Regional Water Quality Control Board, AR 14113, all called upon NMFS to require faster and more effective action to address impacts to SONCC coho, NMFS provides no analysis explaining why the aquatic conservation strategy in the HCP minimizes and mitigates the impacts of the taking to

1 the maximum extent practicable. Simply making a bad circumstance better does not mean that
2 more could not be done. *See Gerber v. Norton*, 294 F.3d 173, 184-85 (D.C. Cir. 2002) (“Merely
3 referencing the Section 10 requirement is not the same as complying with that requirement.”).

4 NMFS’ reliance on the road sediment reduction program provides a clear example of
5 NMFS unlawful conflation of habitat improvement with minimizing and mitigating to the
6 maximum extent practicable. AR 150905 (findings relying on sediment reduction); AR 36127
7 (sediment reduction program). The HCP requires FGS, *after* permit approval, to conduct road
8 surveys to determine how much sediment the roads might deliver to streams. AR 36127. FGS is
9 then supposed to reduce that amount by 50 percent. *Id.* But when it issued the permit NMFS
10 had *no idea* how much sediment FGS roads were delivering to streams or how that sediment was
11 impacting SONCC coho. NMFS made its “minimize and mitigate” finding entirely on the basis
12 of the expectation that harm to SONCC coho would be reduced relative to impacts that are
13 entirely unknown. But what is 50 percent of a question mark? NMFS certainly does not know
14 and its determination that an unknown quantity of mitigation is the “maximum extent
15 practicable” is therefore inherently arbitrary and capricious. *See Sw. Ctr. for Biological*
16 *Diversity*, 470 F. Supp. 2d at 1153 (“Another significant problem with the use of the percentage
17 measurement is that the base is undefined.”).

18 There simply is no rational connection between NMFS’ finding that the HCP will result
19 in reduced take over time and the conclusion that the HCP will minimize and mitigate take to the
20 maximum extent practicable. HCP Handbook at 7-3. NMFS’ Section 10(a)(2)(B)(ii) finding
21 lacks a rational connection between facts found and conclusions made and is therefore arbitrary
22 and capricious. *See Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 42 (citation omitted).

1 J. The Services Violated NEPA by Failing to Disclose Environmental Information and
 2 Consequences.

3 The Services also violated NEPA by failing to disclose environmental information and
 4 consequences. NEPA requires federal agencies to take a “hard look” at “all foreseeable direct
 5 and indirect impacts” of a proposed action. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d
 6 893, 916-17 (9th Cir. 2012); *see also* 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.16. In analyzing
 7 the environmental impacts of a proposed action, NEPA requires a *quantitative* analysis of
 8 environmental consequences. *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846,
 9 869 (2004); *League of Wilderness Defenders-Blue Mts. Biodiversity Project v. Allen*, 615 F.3d
 10 1122, 1144-45 (9th Cir. 2010) (“‘greater’ is a relative term that requires comparison. Without
 11 quantifying actual risk a comparison is not possible”) (Paez, J, dissenting). The FEIS at issue
 12 here fails to comply with NEPA in two important respects.

13 First, it fails to disclose relevant economic data. NEPA requires economic information
 14 and analysis to be disclosed to the public, and, “where economic analysis forms the basis of
 15 choosing among alternatives, that the analysis not be misleading, biased, or incomplete.” *Seattle*
 16 *Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1324 (W.D. Wash. 1994) *aff’d sub nom. Seattle*
 17 *Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). Accurate economic information about
 18 the proposed action is critical to implementing NEPA because “inaccurate economic information
 19 may defeat the purpose of an EIS by impairing the agency’s consideration of the adverse
 20 environmental effects and by skewing the public’s evaluation of the proposed agency action.”
 21 *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005) (internal
 22 quotations omitted).

23 In this case the public was given *no* economic information regarding the applicant FGS,
 24 its harvest plans, business models, and other information that is necessary to determine whether

1 the minimal beneficial aspects of the HCP will be funded and implemented. Indeed, as the
2 Services acknowledge, the “Services have not asked the applicant to disclose its discrete, private,
3 and protected economic business models and plans.” AR 38926. This retort indicates that the
4 Services have abrogated their independent NEPA obligation to disclose information relevant to
5 an informed choice among alternatives about the environmental consequences of the proposed
6 action. Because the entire motivation for FGS to seek an HCP is to permit the company to
7 “increase efficiencies” and “to continue to operate its *commercial* timberlands on a long-term
8 basis while complying with the ESA,” AR 38353 (emphasis added), the economic and financial
9 (i.e., “commercial”) information regarding how the HCP will accomplish this goal for FGS is
10 highly relevant to an adequate consideration of the environmental consequences of the proposed
11 action. *See, Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d
12 1109, 1113 (D.C. Cir. 1971) (requiring a discussion of the economic, as well as environmental,
13 consequences of proposed action). Indeed, the EPA even criticized the Services for failing to
14 provide economic information about FGS’ timber harvest operations. AR 39007-08. Despite the
15 clear connection between the economic and environmental impacts of the proposed action, the
16 FEIS expressly does not disclose financial information about FGS, its harvest plans, business
17 models, and other substantive information that is necessary to determine whether the minimal
18 beneficial aspects of the HCP will be funded and implemented.

19 The FEIS simply states that “[u]nder the Proposed Action, issuance of the ITPs would
20 allow the applicant to harvest more of the currently suitable northern spotted owl habitat in the
21 Plan Area, reducing the amount of even-aged regeneration harvest (clearcutting) necessary to
22 meet its financial targets.” AR 38548; *see also* AR 36263-36264. However, there is nothing in
23 the record that discusses, for example, what these “financial targets” are or what factors may
24 affect them, what specific “economic expenditures” are “too costly,” what “too costly” and

1 “economically and operationally infeasible” mean, and what amount of “income” the applicant
2 “has to produce,” among other considerations. The rationale for how the Services will comply
3 with their ESA obligation to ensure that an HCP is adequately funded is undermined when the
4 underlying environmental review lacks any supporting economic or financial analysis.

5 Second, the Services violated NEPA in failing to disclose and discuss the quantitative
6 direct, indirect, and cumulative environmental consequences of the proposed action. In
7 analyzing the environmental impacts of a proposed action, NEPA requires a *quantitative* analysis
8 of environmental consequences. *League of Wilderness Defenders*, 615 F.3d at 1144-45; *Ocean*
9 *Advocates*, 402 F.3d at 869; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387
10 F.3d 989, 994-95 (9th Cir. 2004); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d
11 1372, 1380 (9th Cir. 1998); *Native Fish Soc’y v. Nat’l Marine Fisheries Serv.*, 2014 WL 199093,
12 *16 (D. Or. Jan. 16, 2014) (requiring disclosure of environmental effects and holding that
13 “simply because a proposed action is expected to decrease the negative impacts in comparison to
14 a much worse historical practice does not mean that the action will not have a significant
15 negative impact itself, only that it will have a less harmful impact than prior actions”).

16 In this case, the FEIS only contains a *relative* comparison of the alternatives and fails to
17 provide specific, quantifiable differences among alternatives including the No Action alternative.

18 For example, regarding anadromous salmonids, the FEIS states:

19 ...the conservation measures under the Proposed Action would *minimize* the
20 potential impacts that could otherwise result from altered hydrology in the Plan
21 Area. They would *reduce* the impacts of forest management on surface runoff and
22 peak flows, *reduce* soil compaction and disturbance, *increase* slope stability, and
23 *maintain* or *enhance* in-channel LWD. Any adverse impacts to anadromous
24 salmonids due to altered hydrology and water quality would be *minimized* and
mitigated by the improved riparian conditions resulting from riparian
management and *decreased* sediment production and delivery.

1 AR 38573 (emphasis added); *see also*, 38541-38544 (geology), 38547-38549 (hydrology),
2 38555- 38559 (biological resources), 38562-38565 (spotted owl), 38569-38574 (salmonids),
3 38585-38588 (fisher). This “analysis” merely states that the design criteria of the proposed
4 action would “minimize,” “reduce,” “decrease,” or “mitigate” environmental impacts compared
5 to the status quo, which would be “beneficial” to natural resources. But these statements tell the
6 public and decision makers nothing about *what* those actual environmental impacts are, because
7 the Services have failed to provide numeric or other objective data. NEPA requires a more
8 rigorous analysis. *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

9 K. The Services Violated NEPA by Failing to Analyze Cumulative Impacts.

10 The Ninth Circuit has noted that there are “two critical features of a cumulative effects
11 analysis”: “first, it must not only describe related projects but also enumerate the environmental
12 effects of those projects...Second, it must consider the interaction of multiple activities and
13 cannot focus exclusively on the environmental impacts of an individual project.” *Or. Natural*
14 *Res. Council Fund v. Brong*, 492 F.3d 1120, 1133 (9th Cir. 2007). The cumulative effects
15 analysis in the FEIS lacks both critical features with regards to the effects of timber harvest on
16 adjacent and nearby federal and nonfederal lands on northern spotted owls, the effects of the
17 application of herbicides and other forest chemicals, and withdrawal of water on FGS land and
18 proximate federal and nonfederal lands on salmonids.

19 First, as KS Wild noted in its comments on the DEIS, the Services’ cumulative impacts
20 analysis is completely devoid of any disclosure or quantification, let alone any analysis, on the
21 cumulative impacts of the timber harvest proposed by the FGS HCP and timber harvest on
22 proximate federal and nonfederal lands. AR 13467-71. For example, in the discussion of the
23 cumulative effects of the proposed action on the northern spotted owl, the only mention of timber
24 operations on adjacent and nearby federal and nonfederal lands is a portion of a single sentence:

1 “For these reasons, the agencies anticipate that the measures associated with the Proposed
 2 Action, in conjunction with ongoing activities on other private and public lands, would result in
 3 substantial benefits to the northern spotted owl, compared to the No Action Alternative.” AR
 4 38633. Noticeably absent is any discussion of what timber (and other) activities have occurred
 5 in the past, are currently being implemented, or are reasonably foreseeable on adjacent and
 6 nearby federal and nonfederal lands, and the effects of those actions, despite internal and external
 7 criticisms of this omission. *See* AR 120, 3245, 3694, 22208, 3940, 16505, 3599, 12870, 4879-
 8 4886, 8407, 8621; NMFS AR 3810. NEPA requires this analysis.⁷ *Muckleshoot*, 177 F.3d at
 9 811; *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005).

10 Second, the FGS FEIS fails to discuss and analyze the cumulative effects on salmonids of
 11 the application of herbicides and other forest chemicals and the withdrawal of water from FGS
 12 land and proximate federal and nonfederal lands. KS Wild specifically asked the Services to
 13 supply this information, AR 38867, but the agencies failed to provide it in the FEIS, AR 38382,
 14 even though the Services acknowledged that the use of herbicides could indeed impact salmonids
 15 and that the information should be disclosed and analyzed. AR 3079, 7582, 39401 (“we could
 16 use more info about FGS’s anticipated use of herbicides”). The Services state that the “[d]raft
 17 EIS does not address the impacts associated with herbicide, pesticide, and fertilizer use ... [and
 18 that] NMFS conclude[d] that there is some potential for forest chemicals to enter salmonid
 19
 20

21 ⁷ The Services’ failure to assess cumulative effects of logging on private lands similarly
 22 renders the FWS BiOp arbitrary and capricious. 50 CFR § 402.1(c)(4) (requiring cumulative
 23 effects analysis); 50 C.F.R. § 402.02 (limiting cumulative effects in ESA context to state and
 24 private actions). FWS acknowledged that such logging is likely to continue, AR 34258, but
 failed to analyze how decreases in habitat on private lands will impact FGS lands, specifically in
 the 24 owl circles that FWS relies upon as mitigation. *Id.*

1 habitats resulting in exposure to the chemicals used by FGS over the 50-year permit term.”⁸ AR
2 38923.

3 Similarly, the Services failed to discuss the cumulative effects of water withdrawals on
4 FGS lands, as well as adjacent and nearby federal and nonfederal lands, on salmonids. AR
5 38504 ("amount and timing" of water drafting is "unquantified"). The proposed locations of
6 these withdrawals for water drafting on FGS lands subject to the HCP are shown on a series of
7 three maps in the FEIS, AR 38449, 38451, 38453; but no information is given as to the proposed
8 use of the withdrawals, amount of withdrawal, season of withdrawal, or any other characteristics
9 of these activities. Further, the FEIS is silent as to the cumulative effects of water withdrawals
10 from FGS lands on salmonids when considered with those from adjacent and nearby federal and
11 nonfederal lands. AR 38626.

12 In the administrative process, the Services acknowledged that the cumulative effects
13 analysis in the FEIS lacked any real detail or analysis, NMFS AR 8723 (Attachment FGS
14 DEIS_010_ S Mendez Comments.doc at 2), and attempted to justify these deficiencies by
15 questioning the usefulness of such an exercise, AR 38809, 38923, 38934, or deferring the
16 discussion to the non-NEPA state-based Timber Harvesting Plan process, AR 38809. But NEPA
17 does not allow an agency to defer its environmental analysis to a non-federal agency at some
18 undetermined point in time in the future. *Muckleshoot*, 177 F.3d at 810. Moreover, the sought
19 after information is relevant to an accurate assessment of the environmental consequences of the
20 action because both the use of herbicides and water drafting can have a significant negative
21 environmental impact. AR 38923 (herbicide “use ha[s] a greater potential to adversely affect
22

23 ⁸ In an early draft of the EIS, Service staff commented on the statement that the application
24 of forest chemicals would not be addressed in the EIS, “why not?” AR 3184. There is no follow
up on this comment in the record, but other Service staff similarly remarked “Why not? This
may develop into the problem with the BO here as we did for Green Diamond [HCP],” AR 6272.

1 aquatic species ... salmonids could experience sub-lethal effects from this exposure (e.g.,
 2 reduced growth”); AR 34208 (water drafting “has the potential to result in adverse effects to the
 3 northern spotted owl”); AR 62671 (water withdrawals are one of the “major activities
 4 responsible for the decline of coho salmon in Oregon and California”). Absent this information,
 5 both the public and the decision-maker have no idea about the extent and magnitude of these
 6 activities, and therefore the potential environmental impacts of these activities.

7 The Services should have conducted a thorough and probing discussion and analysis of
 8 the cumulative effects of past, present, and reasonably foreseeable timber harvest and other
 9 operations, herbicide use, and water withdrawal on FGS lands and proximate federal and
 10 nonfederal lands. The failure to do so is arbitrary, capricious, and not in accord with NEPA,
 11 which demands more than what the Services have done here. *Muckleshoot*, 177 F.3d at 811.

12 V. CONCLUSION.

13 For all of the reasons stated herein, KS Wild respectfully request that this Court grant KS
 14 Wild’ motion for summary judgment, invalidate the incidental take permits, remand the
 15 biological opinions and environmental impact statements to FWS and NMFS, and award costs,
 16 attorneys’ fees, and other expenses to KS Wild.

17 Respectfully submitted this 1st day of August, 2014.

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